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Selective Service Appellate Practice--Expansion of Judicial Review

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SELECTIVE SERVICE APPELLATE PRACTICE— EXPANSION OF JUDICIAL REVIEW

In conscientious objector cases, judicial review of Selective Service decisions has traditionally been limited to a search of the record for a basis in fact to sustain the registrant's classification.[1] If the record reveals facts casting doubt upon the registrant's sincerity and good faith in claiming conscientious objector status, then a presumption arises that the Selective Service acted lawfully in denying classification as a conscientious objector.[2] The classification decision is, therefore, affirmed by the court. *United States v. Atherton*,[3] a case recently decided by the Court of Appeals for the Ninth Circuit, presents an important new development in the law of judicial review.[4] It enlarges the

1. Witmer v. United States, 348 U.S. 375, 382 (1955). The role of the courts is to review the record for "objective facts . . . [which] cast doubt on [the] sincerity of [the] claim." Blalock v. United States, 247 F.2d 615, 619 (4th Cir. 1957). The scope of judicial review is "the narrowest known to the law." The basis in fact test is also set out in 50 U.S.C. APP. § 460(b)(3) (1967) as follows: "That such review shall go to the question of the jurisdiction herein reserved to local boards, appeal boards, and the President only when there is no basis in fact for the classification assigned to such registrant." For a discussion of section 460(b)(3), see Shaw, *Selective Service Litigation and the 1967 Statute*, 48 MILITARY L. REV. 33, 62 (1970). For a review of the constitutionality of section 460(b)(3) see Comment, *Pre-Induction Judicial Review Held Unavailable to Registrant Claiming Statutory Deferment*, 44 N.Y.U.L. REV. 804 (1969); Note, 83 HARV. L. REV. 261 (1969).

2. *E.g.*, Storey v. United States, 370 F.2d 255, 258-59 (9th Cir. 1966); Cramer v. France, 148 F.2d 801, 804-05 (9th Cir. 1945). *See also* Bowles v. United States, 319 U.S. 33, 36 (1943).

3. 430 F.2d 741 (9th Cir. 1970). The court issued its first opinion on October 9, 1969, rejecting Atherton's conviction. The Government filed a Petition for Rehearing En Bank claiming that the majority's opinion conflicted with established case and statutory law. On April 1, 1970, a second opinion was handed down by the court. Subsequently the Government filed a second Petition for Rehearing En Banc, alleging the existence of a basis in fact to doubt Atherton's sincerity. On Sept. 10, 1970, the court withdrew the previous two opinions and substituted a third. Judge Browning stated that no further "petition for rehearing or suggestion for en bank rehearing will be entertained." 430 F.2d at 746. [The first and second opinions of the court will hereinafter be cited as *Atherton*, Oct. opinion and *Atherton*, Apr. opinion.]

4. Judicial review of draft boards procedure is more restricted than judicial review of administrative action generally. As the Supreme Court noted in *Estep*: "The provision making the decisions of the local boards 'final' means to us that Congress chose not to give administrative action under this Act the customary scope of judicial review which obtains under other statutes. It means that the courts are not to weigh the evidence to determine whether the classification made by the local boards was justified. The decisions of the local boards made in conformity with regulations are final even though they may be erroneous. The question of jurisdiction of the local

scope of judicial inquiry into Selective Service appeal board review practices and will cause the Selective Service appeal boards to change their previous procedure of affirming or rejecting local board classifications by an unelaborated yes-no vote.[5] Under the *Atherton* rule, if the local board applies incorrect legal standards to deny a conscientious objector exemption, and if the appeal board affirms the local board's decision, the appeal board is required to state explicitly the reasons for its classification of the registrant. This Note will examine the rationale behind the *Atherton* decision, its consistency with prior decisions and its possible future effects.

In *Atherton*, the local board applied incorrect legal standards in denying Atherton's claim for exemption from military service as a conscientious objector.[6] The appeal board affirmed the local board's decision without indicating its reasons for affirmance.[7] There was some uncertainty as to whether the record revealed a basis in fact for denial of Atherton's conscientious objector claim. Judges Browning and Hamley held the appeal board's review of Atherton's file insufficient to cure local board error and reversed Atherton's conviction.[8] In his dissent, Judge Ely contended that the presumption of lawful operation of the appeal board, plus the existence of a basis in fact on the record for doubting Atherton's sincerity, obviated the need for a recitation of the grounds for the appeal board's decision.[9]

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board is reached only if there is no basis in fact for the classification which it gave to the registrant." Estep v. United States, 327 U.S. 114, 122-23 (1946). The Government noted that: "As it now stands the majority opinion in *Atherton* jeopardizes thousands of appeal board classification decisions which predate *Atherton* and which were in harmony with the then established case law of this and other circuits. By allowing the courts to judge the actions of an appeal board by considering the prior actions of a local board, the majority opinion dramatically expands the boundaries of judicial review in an area where the scope of review has been consistently held to be 'the narrowest known to law.' *Maynard v. United States*, 409 F.2d 505, 506 (9th Cir. 1969)." First Petition for Rehearing, United States v. Atherton, 430 F.2d 741 (9th Cir. 1970).

5. 32 C.F.R. §§ 1626.21-.27 (1970). In particular, section 1626.27(a) provides: "When the appeal board makes its classification, it shall record its decision showing a yes or no vote upon the Individual Appeal Record. . . ." There is no statute requiring the appeal board to make any finding of fact or conclusion of law. *See* Gatchell v. United States, 378 F.2d 287 (9th Cir. 1967); DeRemer v. United States, 340 F.2d 712 (8th Cir. 1965). For cases in the Ninth Circuit conflicting with *Atherton* see Bishop v. United States, 412 F.2d 1064, 1069 (9th Cir. 1969); Storey v. United States, 370 F.2d 255, 259 (9th Cir. 1966); Tyrrell v. United States, 200 F.2d 8, 11 (9th Cir. 1952).

6. *Atherton*, Apr. opinion, at 2-3.

7. *Atherton*, Oct. opinion, at 5.

8. *Id.* at 4.

9. *Id.* at 5.

Local Board Classification[10]—Erroneous Legal Standards Applied

Defendant Atherton's local board had rejected his conscientious objector claim[11] on the grounds that "[he was] not a member of any particular religious sect," and that he based his claim "on his own personal beliefs."[12] It is settled law, however, that to qualify for a conscientious objector exemption one need not be a member of a religious sect.[13] As the Supreme Court pointed out in *United States v. Seeger*:

> The Congress recognized that one might be religious without belonging to an organized church just as surely as minority members of a faith not opposed to war might through religious reading reach a conviction against participation in war. [W]hile shifting the test from membership in such a church to one's individual belief the Congress nevertheless continued its historic practice of excusing from armed service those who believed that they owed an obligation superior to that due the state of not participating in war in any form.[14]

Since Atherton expressly claimed "religious faith" as the basis of his objection to war, and nothing in the record contradicted his statement, the Ninth Circuit held that the local board erred by using "membership in a religious sect" as its legal standard for interpreting religious training and belief.[15]

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10. A review of the attitudes and work practices of 4,080 local boards is available in NATIONAL ADVISORY COMM'N ON SELECTIVE SERVICE, IN PURSUIT OF EQUITY: WHO SERVES WHEN NOT ALL SERVE? (1967). At the time of the Commission Report the average local board consisted of three male members, white, over 30 years of age, and veterans of military service. *Id.*, Table 1.6 at 75, Table 1.2 at 73, Table 1.3 at 74. Cited in Ginger, *Minimum Due Process Standards in Selective Service Cases—Part I*, 19 HASTINGS L.J. 1313, 1323 (1968).

11. *See generally* HANDBOOK FOR CONSCIENTIOUS OBJECTORS (9th ed. A. Tatum 1967) (Central Committee for Conscientious Objector Cases pub.); Smith, *Conscientious Objection to Military Service: A Layman's View*, 26 GUILD PRACTITIONER 65 (1967); Note, *Pre-Induction Availability of the Right to Claim Conscientious Objector Exemption*, 72 YALE L.J. 1459 (1963); Comment, *Selective Service Litigation Since 1960*, 23 MILITARY L. REV. 101 (1964); *An Examination of Fairness in Selective Service Procedure*, 37 GEO. WASH. L. REV. 564 (1969).

12. *Atherton*, Apr. opinion, at 2.

13. The statutory authority for a conscientious objector claim is section 456(j) of the Selective Service Act of 1967 which states: "Nothing contained in this title . . . shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. As used in this subsection, the term 'religious training and belief' does not include essentially political, sociological, or philosophical views, or a merely personal moral code." 50 U.S.C. APP. § 456(j) (1970). For an analysis of the application of the act, see White, *Processing Conscientious Objector Claims: A Congressional Inquiry*, 56 CALIF. L. REV. 652 (1968).

14. 380 U.S. 163, 172 (1965).

15. *Atherton*, Apr. opinion, at 2.

Another related ground for the rejection of Atherton's claim by the local board was that the defendant based his claim "on his own personal beliefs."[16] This, the court noted, could have been a reference to the exclusion of conscientious objector claims based upon "a merely personal moral code."[17] But this exclusion applies only where the moral code is the *sole* basis for the defendant's opposition to war.[18] It does not apply in cases like *Atherton*, where the registrant's moral code is closely interwoven with his religious beliefs.

The Ninth Circuit majority found nothing in the local board's minutes to indicate that the board had considered the *sincerity of* Atherton's claim.[19] The board had discussed whether Atherton was a "genuine conscientious objector," but subsequent entries in the local board's minutes led the court to conclude that the board was "referring to whether [the] defendant's claim fell within the statutory definition of a conscientious objector and not to the sincerity of his claim."[20]

Judge Ely vigorously dissented, contending that the majority opinion was unsupported by the facts.[21] He felt the majority violated traditional principles of judicial review when it analyzed the local board's minutes to discover the rationale of the board's classification.[22]

> [M]y Brothers attempt to bolster their decision by hypothecating [*sic*] what might have been the basis of the board's action by taking from their context certain statements which were made during Atherton's personal appearance before the local board. In the process, the majority appears to ignore the traditional and often recognized presumption that the board has performed its duties with regularity. *See, e.g., Bishop v. United States*, 412 F.2d 1064, 1067 (9th Cir. 1969). I believe that this approach is improper under the established principles which limit our role in these matters.[23]

16. *Id.*

17. *Id.* See note 13 *supra.*

18. *Id.* In *Seeger*, the Supreme Court stated: "We have construed the statutory definition broadly and it follows that any exception to it must be interpreted narrowly. The use by Congress of the words 'merely personal' seems to us to restrict the exception to a moral code which is not only personal but which is the *sole* basis for the registrant's belief and is in no way related to a Supreme Being." United States v. Seeger, 380 U.S. 163, 186 (1965) (emphasis added).

19. 430 F.2d at 743.

20. *Id.*

21. 430 F.2d at 747.

22. *Id.*

23. *Atherton*, Apr. opinion, at 12. *See, e.g.*, Storey v. United States, 370 F.2d 255 (9th Cir. 1966); United States v. Chodorski, 240 F.2d 590 (7th Cir. 1956); Tomlinson v. United States, 216 F.2d 12 (9th Cir. 1954); Reed v. United States, 205 F.2d 216 (9th Cir. 1953); Davis v. United States, 203 F.2d 853 (8th Cir. 1953); *cert. denied*, 345 U.S. 996 (1953); Tyrrell v. United States, 200 F.2d 8 (9th Cir. 1952); Cramer v. France, 148 F.2d 801 (9th Cir. 1945). These are cases in which the courts

The Basis in Fact Issue

Judicial review of Selective Service classifications is traditionally restricted to ascertaining (1) whether the local board's determination had some basis in fact on the record and (2) whether the board applied a correct legal standard.[24] Judge Ely tacitly conceded that Atherton had made out a prima facie conscientious objector claim, but maintained that ample facts supported an inference that his beliefs were not sincerely held.[25]

For instance, the dissent notes, Atherton had been classified 1-A when he left the University of California at Santa Barbara after completing one-half of his freshman year. To avoid the possibility of future induction, he then preregistered at U.C.S.B. 6 months before the fall semester began and meanwhile attended a summer session at Chaffey College. When ordered to report for induction, he requested and eventually received a II-S deferment to complete the school year. When this deferment expired Atherton was again classified I-A and received his second order to report for induction. At this time, Atherton requested a reopening of his classification and completed a Conscientious Objector's Form (SSS Form No. 150). The local board cancelled Atherton's second induction order to consider his new claim for exemption.[26] The board then refused to grant Atherton a conscientious objector exemption but did grant him a personal appearance to contest this decision.[27] At his appearance before the board, Atherton informed its members of his beliefs concerning war which, he claimed had crystallized within the preceding 2 years. The board could not reconcile this claim with his failure to request conscientious objector status prior to his first induction order, since Atherton had claimed he held these

applied the presumption of validity of an appeal board decision where the registrant's local board allegedly applied erroneous standards.

24. *See* United States v. Carroll, 398 F.2d 651 (3d Cir. 1968); Peterson v. Clark, 289 F. Supp. 949 (N.D. Cal. 1968). *See generally* Note, *Fairness and Due Process Under the Selective Service System*, 114 U. PA. L. REV. 1014 (1966).

25. 430 F.2d at 747.

26. No uniform standards of proof govern the local board's decision to open the registrant's file. The board is directed to "consider new information which it receives and, if the local board determines that such new information justifies a change in the registrant's classification, the local board shall reopen and classify the registrant anew. If the local board determines that such new information does not justify a change in the registrant's classification, it shall not reopen the registrant's classification." 32 C.F.R. § 1624.2(c) (1970).

27. The registrant can request a personal appearance before his local board or he can appeal to the appeal board. 32 C.F.R. §§ 1624.1, 1626.2(a) (1970). There is no right to counsel at the personal appearance. *Id.* § 1624.1(b). The appearance of witnesses is at the board's discretion. *Id.* § 1624.1(b). *See generally* Comment, *The Selective Service System: An Administrative Obstacle Course*, 54 CALIF. L. REV. 2123, 2154-56 (1966).

beliefs for the preceding 2 years.[28] His claim, therefore, was again denied by the local board. The appeal board unanimously affirmed.[29]

At the induction center, Atherton indicated that he was addicted to drugs, tended toward homosexuality and was suffering or had suffered from, *inter alia*, mumps; eye trouble; running ears; hay fever; soaking sweats; asthma; palpitations of the heart; frequent and painful urination; sugar and albumin in the urine; recent loss of weight; car, train, sea, and air sickness; frequent trouble sleeping; frequent and terrifying nightmares; depression and excessive worry; loss of memory or amnesia and staphylococcus. No evidence of these afflictions was discovered by the examining physicians.[30] Under these circumstances, Judge Ely asserted that "indubitably, there was [a] 'basis in fact' for the challenged classification."[31]

Judge Ely did not pinpoint which facts in the record gave rise to inferences of Atherton's insincerity. Atherton's untruthful representations concerning his medical history were made at the induction center *after* the administrative review process was over; these misrepresentations therefore could not suffice as a basis in fact. The only "inconsistency" in Atherton's statements was his failure to notify the local board of his conscientious objection to war, prior to his first induction order. This omission, coupled with Atherton's dropping out of school and subsequent early preregistration to qualify for a II-S deferment, was apparently interpreted by Judge Ely as a basis in fact to doubt Atherton's sincerity.

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28. *Atherton*, Apr. opinion, at 12. For discussion concerning when one may claim to have crystallized his beliefs as a conscientious objector see United States v. Gearey, 379 F.2d 915 (2d Cir. 1967), *cert. denied*, 389 U.S. 959 (1967); Clancy & Weiss, *The Conscientious Objector Exemption: Problems in Conceptual Clarity and Constitutional Considerations*, 17 MAINE L. REV. 143, 147 (1965); Note, *Selective Service: Conscientious Objection*, 21 HASTINGS L.J. 1038 (1970); Note, *Pre-Induction Availability of the Right to Claim Conscientious Objector Exemption*, 72 YALE L.J. 1459 (1963).

29. *Atherton*, Apr. opinion, at 12-14. If the decision of the appeal board is not unanimous, the registrant can appeal to the President. 32 C.F.R. § 1627.3 (1970).

30. *Atherton*, Apr. opinion, at 14.

31. 430 F.2d at 747. In the first two opinions the majority rejected the argument that the local board had any basis in fact for finding Atherton's claim insincere. The defendant's failure to mention his conscientious opposition to war on prior deferment applications, the court held, did not give rise to an inference of insincerity or bad faith. The majority relied on Witmer v. United States, 348 U.S. 375 (1955), where the Supreme Court held that successive deferment applications, inconsistent with a conscientious objector claim, are sufficient to cast doubt on the registrant's sincerity. In *Witmer* the registrant had first contended he was a farmer on his family's land. In his farm exemption claim, Witmer expressly disclaimed any ministerial exemption by writing the phrase, "Does not apply," opposite the line inquiring whether he was a "Minister, or Student Preparing for the Ministry." *Id.* at 378. In addition, he promised to

Appeal Board Review[32]

The Selective Service appeal board, in theory, reviews and examines a registrant's local board classification de novo in order to discover and cure error or prejudice by the local board.[33] The federal regulations prohibit relevant additional information, not made available to the local board, from being presented to the appeal board.[34] Since the registrant makes a personal appearance only before the local board, such factors as his demeanor, his manner of answering questions and his personal appearance give the local board special insights not available to those reviewing the record. This fact alone seems to necessitate a more limited appeal board review, since the sincerity of the registrant can be more accurately evaluated by the local board. The Ninth Circuit in *Atherton* did not expressly state whether any basis in fact existed, but Judge Ely, in his dissent, argued that the majority had tacitly so conceded.[35]

Traditionally, denial of a conscientious objector classification will be upheld when the court's review of the record reveals a basis in fact for doubting the applicant's sincerity.[36] The Ninth Circuit's decision in

increase farm production and to "contribute a satisfactory amount for the war effort." *Id.* at 378. Later, it was discovered, the land had been uncultivated for 23 years. *Id.* Eight days after his exemption claim as a farmer was denied, Witmer applied for an exemption as a full-time minister. *Id.* at 379. The Supreme Court held these deferment applications inconsistent and affirmed the conviction.

In *Atherton*, on the other hand, the registrant was granted a student deferment and after it had expired, sought conscientious objector status. The Ninth Circuit found no inference of insincerity from these successive claims, because Atherton's request for deferment as a student was not inconsistent with his views in opposition to war. *Atherton*, Apr. opinion, at 3.

32. The appeal board is normally composed of five members who are citizens, not members of the armed forces, between 30 and 75 years old and residents of the area of the registrant. 32 C.F.R. § 1604.22 (1970).

33. *See* Storey v. United States, 370 F.2d 255, 260 (9th Cir. 1966); DeRemer v. United States, 340 F.2d 712, 719 (8th Cir. 1965).

34. The material presented to the appeal board is limited by 32 C.F.R. § 1626.24 (1970) which states, in part: "(b) In reviewing the appeal and classify the registrant, the appeal board shall not review or consider any information other than the following:
(1) Information contained in the record received from the local board.
(2) General information concerning economic, industrial, and social conditions."

35. "If I interpret this third opinion correctly, the majority has now, in essence, reverted to that position [the existence of a basis in fact to doubt Atherton's sincerity] which was so vigorously assailed by the Government in its first Petition for Rehearing." 430 F.2d at 747.

36. *See, e.g.*, Oesterich v. Selective Serv. 393 U.S. 233, 239 (1969) (Harlan, J., concurring); Storey v. United States, 370 F.2d 255 (9th Cir. 1966); DeRemer v. United States, 340 F.2d 712 (8th Cir. 1965); Tomlinson v. United States, 216 F.2d 12 (9th Cir. 1954), *cert. denied*, 348 U.S. 970 (1955); *cf.* Shepherd v. United States, 217 F.2d 942 (9th Cir. 1954); Wells v. United States, 158 F.2d 932 (5th Cir. 1946), *cert. denied*, 330 U.S. 827 (1947); United States v. Fratrick, 140 F.2d 5 (7th Cir. 1944).

Atherton did not turn on the basis in fact test. Instead, the court went beyond the normal scope of judicial review to consider the effect upon the Selective Service process of the local board's use of illegal classification standards. The result was a policy statement concerning the so-called cure doctrine.

Cure Doctrine

Federal courts are called upon to review Selective Service classification decisions whenever a registrant challenges the validity of his classification as a defense to a criminal prosecution for refusal to submit to induction. It is not unusual for the reviewing court to discover both (1) that the defendant's local board relied on incorrect legal standards when it refused to classify him as a conscientious objector;[37] and (2) that the record reveals a basis in fact for doubting the defendant's sincerity. If in such a case the local board's decision has been reviewed and affirmed by the appeal board, and if the appeal board gives no reason for affirmance, the reviewing court has traditionally *presumed* that the appeal board disregarded the local board's legal errors and relied solely on facts in the record showing insincerity. This presumption is known as the "cure doctrine."[38]

The cure doctrine, as developed by the courts, is subject to certain limitations and exceptions. It does not apply if the local board refuses to include certain evidence in the registrant's file, for in that case the appeal board could not detect and correct the error.[39] Similarly, the doctrine does not apply if the local board's errors result in an inadequate presentation of the registrant's claim before the appeal board.[40] Although the *Atherton* majority held the cure doctrine inapplicable, it did state that the doctrine will continue to apply in cases where the record affirmatively indicates nonadoption of the local board's error by the appeal board.[41]

37. *E.g.*, United States v. Stepler, 258 F.2d 310 (3d Cir. 1958) (local board used illegal standard); United States v. Peebles, 220 F.2d 114, 119-20 (7th Cir. 1955) (appeal board influenced by the local board's bias); United States v. Fry, 203 F.2d 638, 640 (2d Cir. 1953) (inadequate presentation before appeal board).

38. *E.g.*, Storey v. United States, 370 F.2d 255, 258-59 (9th Cir. 1966); Cramer v. France, 148 F.2d 801, 804-05 (9th Cir. 1945). *See also* Bowles v. United States, 319 U.S. 33, 35-36 (1943).

39. *See* United States v. Fry, 203 F.2d 638, 640 (2d Cir. 1953); United States v. Zieber, 161 F.2d 90, 92-93 (3d Cir. 1947).

40. United States v. Peebles, 220 F.2d 114, 119-20 (7th Cir. 1955); United States v. Stiles, 169 F.2d 455 (3d Cir. 1948); United States v. Zeiber, 161 F.2d 47 (3d Cir. 1947).

41. For cases where errors were corrected before the appeal board acted, see Storey v. United States, 370 F.2d 255, 258-59 (9th Cir. 1966); United States v. Moore, 217 F.2d 428, 431-32 (7th Cir. 1954); Tyrrell v. United States, 200 F.2d 8, 11 (9th Cir. 1952).

The error of law committed by Atherton's local board was its misinterpretation of the statutory criteria for determining the validity of a conscientious objector claim.[42] Upon review, the appeal board made no comment on the local board's error, but merely affirmed the local board's action. The majority held the cure doctrine inapplicable because it could not be "assumed that the appeal board applied proper classification standards in this case."[43]

As Judge Ely pointed out, the majority's holding departed from earlier cases in the Ninth and other circuits insofar as it rejected the presumption of appeal board correction of local board error.[44] The majority's decision in *Atherton* appears to establish a presumption of appeal board *adoption* of local board error unless the appeal board expressly recites a lawful basis for its decision.

In order to support its holding that the cure doctrine should not apply in *Atherton*, the Ninth Circuit surveyed a considerable volume of prior decisional authority. A Second Circuit case, *United States v. Stepler*,[45] was cited as authority for holding the cure doctrine inapplicable. In *Stepler*, the facts were similar to the facts of *Atherton*. Stepler's local board had relied upon an erroneous legal standard in denying his request for a ministerial exemption as a Jehovah's Witness. The *Stepler* court noted:

> [T]he question in a case of this kind is whether the original irregularities before the local board affected the review by the appeal board, in other words, whether the decision of the appeal board perpetuated the procedural errors of the local board. . . .
>
> From this record we cannot tell whether the appeal board accepted the [unlawful] reasons given by the local board. Since the record is so unclear, we cannot say that the error of the local board was cured on appeal.[46]

The Ninth Circuit drew additional support for the *Atherton* decision from dictum by Judge Friendly in *United States v. Corliss*:[47]

> It is settled that where there is no evidence that the Apeal Board has been misled, unfair conduct by members of the Local Board will not upset a classification. . . . *Cases where the Local Board had applied an erroneous test and it is impossible to tell whether the Appeal Board relied on this . . . are distinguishable.*

Both of these Second Circuit cases tend to support the proposition that the cure doctrine should not apply in a case where, as in *Atherton*,

42. *Atherton*, Apr. opinion, at 2-3.

43. *Id.* at 4.

44. *Atherton*, Oct. opinion, at 6. See cases cited note 24 *supra*.

45. 258 F.2d 310 (3d Cir. 1958).

46. *Id.* at 316-17.

47. 280 F.2d 808, 816-17 (2d Cir.), *cert. denied*, 364 U.S. 884 (1960) (emphasis added).

the local board relies on erroneous legal standards and the appeal board affirms the local board's classification decision without comment, thereby making it impossible for the reviewing court to determine whether or not the appeal board endorsed the local board's error. But even though *Atherton* may bring the Ninth Circuit into line with other circuits in this respect, it throws the Ninth Circuit itself into a state of conflict.[48] In *Bishop v. United States*,[49] for example, the defendant attempted to show that his local board relied on erroneous legal standards in rejecting his conscientious objector claim.[50] In *Bishop*, as in *Atherton*, the appeal board gave no reason for rejecting Bishop's claim.[51] The court nevertheless found a "basis in fact" for doubting the defendant's sincerity.[52] The basis in fact, coupled with the presumption of the lawful operation of the appeal board, led the court to sustain the denial of the defendant's claim. Judge Ely, writing for the majority in *Bishop*, asserted:

> Initially, we must reject Bishop's assumption that were we to decide that incorrect standards were applied by his local board, reversal is required. That question was settled in *Tomlinson v. United States*, 216 F.2d 12 (9th Cir. 1954), *cert. denied*, 348 U.S. 970 (1955), 75 S. Ct. 528, 99 L. Ed. 755, wherein we explained that it is the very purpose of the appeal board to correct any local board errors by making its separate investigation of the registrant's file and an independent classification decision. [Citations omitted.] Accordingly, we limit our scrutiny to the standards applied by Bishop's appeal board.[53]

In *Atherton*, the majority discounted any apparent conflict with *Bishop*. They interpreted *Bishop* merely as a rejection of the contention that reversal is *required* if the local board used incorrect standards. Nonetheless, it is difficult to escape the conclusion that *Bishop* is di-

48. Cases cited note 5 *supra*.

49. 412 F.2d 1064 (9th Cir. 1969).

50. *Id.* at 1065. Prior to the Military Selective Service Act of 1967, the appeal board could seek an advisory opinion concerning the registrant's conscientious objector claim from the Department of Justice. Bishop contended that the Department's unfavorable recommendation rested upon illegal grounds and hence invalidated the appeal board's rejection of his claim. *See also* Sicurella v. United States, 348 U.S. 385 (1955); Shepherd v. United States, 217 F.2d 942 (9th Cir. 1954). Since the local board is the only agency in the induction process before which the registrant may personally appear, some courts have held that anything less than a full and fair hearing will invalidate the petitioner's classification, even if he is reclassified by his appeal board. *E.g.*, Franks v. United States, 216 F.2d 266, 270 (9th Cir. 1954); United States v. Craig, 207 F.2d 888, 891 (3d Cir. 1953); Mintz v. Howlett, 207 F.2d 758, 762 (2d Cir. 1953); Knox v. United States, 200 F.2d 398, 401-02 (9th Cir. 1952). *See also* Niznik v. United States, 173 F.2d 328, 336 (6th Cir. 1949).

51. 412 F.2d at 1065.

52. *Id.* at 1069.

53. *Id.* at 1065-66.

rectly contrary to the majority holding in *Atherton*. *Atherton* sets up procedural rules which, if not followed, require reversal. If the local board errs and the appeal board gives no indication that it relied upon independent classification standards, then even if there existed a basis in fact in the record to support it, the classification decision will be reversed.[54] This was precisely the contention advanced by Bishop, which the court in that case rejected.

Case Authority for the Ninth Circuit's Position

Perhaps in an effort to minimize its clear departure from prior case law, the *Atherton* majority relied on various points—not all of them relevant—in other draft cases to buttress its holding.

For instance, the first two cases, *Bowles v. United States*[55] and *United States v. Morico*,[56] are not squarely in point, since neither presented a situation in which the defendant's local board committed material errors of law. In *Bowles*, the defendant alleged that his local board applied an incorrect legal standard in determining his conscientious objector claim.[57] Bowles took an appeal to the President before the local draft board issued its order.[58] In such cases, decision for the President is made by the Director of Selective Service.[59] The order for induction was based upon the intervening Selective Service Director's decision, which had the effect of superseding the local board's action.[60] Therefore *Bowles*, unlike *Atherton*, did not reach the question of the legality of the local board's classification standard.[61]

In *Morico*, the local and appeal board chairmen testified at the defendant's trial that they both had applied different criteria in classifying him.[62] The court explicitly noted: "A reading of that transcript makes it absolutely clear that the proper legal standard was applied by the local board."[63] *Bowles* and *Morico* clearly differ from *Atherton* since, in those cases, no actual local board error was established.

54. *Atherton*, Apr. opinion, at 8. In the official opinion the court did not say whether there was a basis in fact on the record to doubt Atherton's sincerity.

55. 319 U.S. 33 (1943).

56. 415 F.2d 138 (2d Cir. 1969).

57. 319 U.S. at 34.

58. *Id.* at 35.

59. Selective Training and Service Act of 1940, § 628.1, 54 Stat. 885 (now 32 C.F.R. § 1627.1(b) 1970).

60. 319 U.S. at 35-36. The regulations provide that "[w]henever an appeal to the President has been taken by a person entitled to do so, any order to report for induction which has previously been issued to the registrant shall be ineffective and shall be cancelled by the local board." 32 C.F.R. § 1527.8 (1970).

61. 319 U.S. at 34-35.

62. United States v. Morico, 415 F.2d 138, 143-44 (2d Cir. 1969).

63. *Id.* at 143.

In the third and fourth cases relied upon by the majority, any possible error by the local board was moot, because the appeal board *expressly* adopted independent classification criteria for the petitioner. *DeRemer v. United States*[64] held simply that the registrant need not be furnished with a copy of the Department of Justice hearing officer's report and the report may be omitted from his selective service file for review by his appeal board. Defendant DeRemer contended that the hearing officer's report was based on erroneous conclusions of law and that his local board was biased and denied him a fair hearing.[65] The defendant desired conscientious objector status but was employed in a factory doing solely defense work for the Navy. The court noted that DeRemer could not attack his I-A-O (exemption from combatant service) classification by his appeal board merely because of alleged local board bias. The I-A-O classification was made by the appeal board and not by the local board,[66] which had classified him I-A.[67]

In *United States v. Van Hook*,[68] the appeal board sent a letter to the local board stating that its classification decision was reached independently of the local board's.[69] The issue of an alleged improper standard applied at the local board level was, therefore, never reached; it was held immaterial in view of the appeal board's review and classification de novo.[70]

The operation of a cure doctrine presupposes some error by the local board. Independent classification by the appeal board should be the normal mode of its operation. However, unless an error by the local board is established, there is no reason to apply the cure doctrine. The above cases are not controlling authority for the *Atherton* majority's position that the cure doctrine applies only where the record indicates that the local board error was not adopted by the appeal board. In *DeRemer* and *Van Hook*, either the local board action was explicitly found lawful, or its legality was not considered since the appeal board expressly employed independent classification criteria.

Of all the cases the majority cited, *Tomlinson v. United States*[71]

64. 340 F.2d 712, 715-16 (8th Cir. 1965).

65. *Id.* at 718-19.

66. *Id.* at 719.

67. *Id.* at 718. The court states: "In the instant case we have no denial of an exemption *in toto*, but rather a limited exemption (from combatant service only) which the Appeal Board apparently felt was all that was here justified. The Appeal Board can only be considered as having made that decision from a consideration of all of the facts before it, and this clearly includes the means by which appellant was then earning his living." *Id.*

68. 284 F.2d 489 (7th Cir. 1960).

69. *Id.* at 491.

70. *Id.*

71. 216 F.2d 12 (9th Cir. 1954).

is its strongest authority, because the facts in that case were similar to those in *Atherton*.[72] But even *Tomlinson* differed significantly from *Atherton*, for the record *affirmatively showed* that the appeal board did not adopt the error made by the local board. In *Tomlinson*, the registrant was classified I-A-O by his appeal board.[73] He refused to perform noncombatant military service and claimed that he should have been classified I-O—that is, conscientiously opposed to both combatant and noncombatant military service. The registrant claimed that his local board denied him a full and fair hearing, because he was not permitted to read the Bible to the board to substantiate his conscientious objector claim.[74] Also, the local board's minutes noted that the petitioner was not "ordained" as a minister in a theological school. Tomlinson claimed his board was setting up its own definition of a minister of religion.[75] The court found that "such error was curred by the action of the appeal board."[76]

Atherton is readily distinguishable from *Tomlinson*, since Atherton's appeal board, unlike Tomlinson's, did not state the reason for its affirmance of the local board action. Also, in *Atherton*, unlike *Tomlinson*, it was established that the local board committed an error of law in its classification decision.

Sicurella v. United States[77] and *Ypparila v. United States*,[78] also cited by the *Atherton* majority, are similar to *Atherton* because in these cases the appeal board apparently did not state the reason for its decision. The difficulty in using these cases to support *Atherton*, however, is that in each case the erroneous standards applied by the local board in classifying the registrant were based upon recommendations from

72. United States v. Atherton, 430 F.2d 741, 745 n.6 (9th Cir. 1970). The Ninth Circuit in the same note also cites United States v. Chodorski, 240 F.2d 590 (7th Cir. 1956). Chodorski's local board applied an improper test in determining whether he was a minister. *Id.* at 591. The petitioner filed a statement with his appeal application pointing out the local board's mistake. Subsequently, the appeal board set aside the petitioner's I-A classification and placed him in class I-O, that is, a conscentious objector. The appellant refused to perform any type of civilian work. He was indicted and convicted for not accepting his assignment at the Illinois State Hospital at Manteno. *Id.* This case is not in point since the appellant received a I-O classification from the appeal board. The majority's reliance on it may be explained by their error in thinking Chodorski had received a I-A-O rather than a I-O classification.

73. 216 F.2d at 13. "Conscientious objector[s] available for noncombatant military service only" are classified I-A-O. 32 C.F.R. § 1622.11 (1970). "Conscientious objector[s] available for civilian work contributing to the maintenance of the national health, safety, or interest" are classified I-O. *Id.* § 1622.14.

74. 216 F.2d at 15.

75. *Id.*

76. *Id.* at 16.

77. 348 U.S. 385 (1955).

78. 219 F.2d 465 (10th Cir. 1954).

the Department of Justice. Sicurella's willingness to fight in "theocratic wars"[79] was thought by the department to show a lack of sincerity. In *Ypparila*, the defendant's classification may also have been based upon statements that he believed in participation in theocratic wars.[80]

Such recommendations would naturally have greater influence on the appeal board than would errors originating in the local board. The majority, by relying upon *Sicurella* and *Ypparila*, proceeded upon the rather implausible premise that an appeal board would be no more influenced by statements from the Department of Justice than by statements from a local draft board.[81]

In his dissent, Judge Ely considered the majority's reliance on *Sicurella* and *Ypparila* misplaced, and noted that the appeal board "would be greatly influenced by an interpretation of existing law which was supplied to it by the Department of Justice."[82] The Supreme Court in *Sicurella* agreed:

> [W]e feel that this error of law by the Department, to which the Appeal Board might naturally look for guidance on such questions, must vitiate the entire proceedings at least where it is not clear that the Board relied on some legitimate ground.[83]

Justice and the Selective Service Bureaucracy

Assuming there was a basis in fact to support a Selective Service finding of insincerity, it is difficult to dispute Judge Ely's conclusion that the *Atherton* majority made a departure from prior case law in the Ninth Circuit. The indications are that this departure was a desirable one. The cure doctrine—heavily relied upon in the dissenting opinion—is of doubtful validity and wisdom in light of the realities of the Selective Service System. Results of a recent survey underscore

79. The Supreme Court in *Sicurella* stated: "As to theocratic war, petitioner's willingness to fight on the orders of Jehovah is tempered by the fact that, as far as we know, their history . . . and their theology does not appear to contemplate one in the future. And although Jehovah's Witnesses may fight in the Armageddon, we are not able to stretch our imagination to the point of believing that the yardstick of the Congress includes within its measure such spiritual wars between the powers of good and evil where the Jehovah's Witnesses, if they participate, will do so without carnal weapons." 348 U.S. at 390-91.

80. 219 F.2d at 468-69.

81. "Appeal board chairmen interviewed admitted their panels gave consideration and credence to classifications made by local boards, particularly in close cases. Comment, *The Selective Service System: An Admniistrative Obstacle Course*, 54 CALIF. L. REV. 2123, 2159 (1966), *cited in* United States v. Atherton, 430 F.2d 741, 746 n.9 (9th Cir. 1970).

82. *Atherton*, Oct. opinion, at 7.

83. 348 U.S. at 392.

the dangers of presuming that appeal board review will cure local board error in any given case:

> In several jurisdictions where appeal board practices were studied in connection with criminal charges against registrants for draft refusal, it developed that the boards, staffed by volunteers, met once or twice a month to consider a tremendous volume of files. They decided a case every 10 seconds in a 4-or-5-hour session.[84]

If this information is accurate, then it is fair to characterize the appeal board decision as a mere echo or rubber-stamping of the local board's classification decision. Thus the fundamental premise underlying the *Atherton* decision—that the appeal board's decision is very likely to be influenced by a local board's legal errors—seems eminently sound.

Conclusion

The effect of *Atherton* on future prosecutions for refusal to be inducted may be summarized as follows: Under the *Atherton* rule, a reviewing court must reverse the Selective Service classification decision in any case where (1) the local board's basis for its rejection of the defendant's conscientious objector application includes erroneous legal standards, and (2) the appeal board has affirmed the local board's decision without expressly indicating on the record that its affirmance rested on legal grounds and *not* on the local board's errors. This rule *apparently* applies even where the defendant's Selective Service file reveals a basis in fact which would support a determination of insincerity[85]—although a *caveat* should be introduced at this point, since the *Atherton* majority did not expressly state whether they found a basis in fact in the record then before the court. If a case should arise in which the local board relies on erroneous legal standards, the appeal board affirms without comment *and* the defendant's Selective Service file clearly reveals a basis in fact sufficient to support a determination of insincerity, the court might well uphold the classification decision and distinguish *Atherton* on the ground that there no basis in fact was clearly shown.

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84. Margolis, *Trying a Case Under the Selective Service Law*, 26 GUILD PRACTIONER 100, 103 (1967). Another study in the San Francisco area indicated that local boards averaged less than 1 minute's consideration per case during 1967. Hunn, *Draft Boards—A Guardian Probe*, [San Francisco] Bay Guardian, Dec. 19, 1967, at 3, col. 3. *See also* Ginger, *Minimum Due Process Standards in Selective Service Cases—Part I*, 19 HASTINGS L.J. 1313 (1968).

85. United States v. Callison, No. 23,014 (9th Cir., Nov. 9, 1970).

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